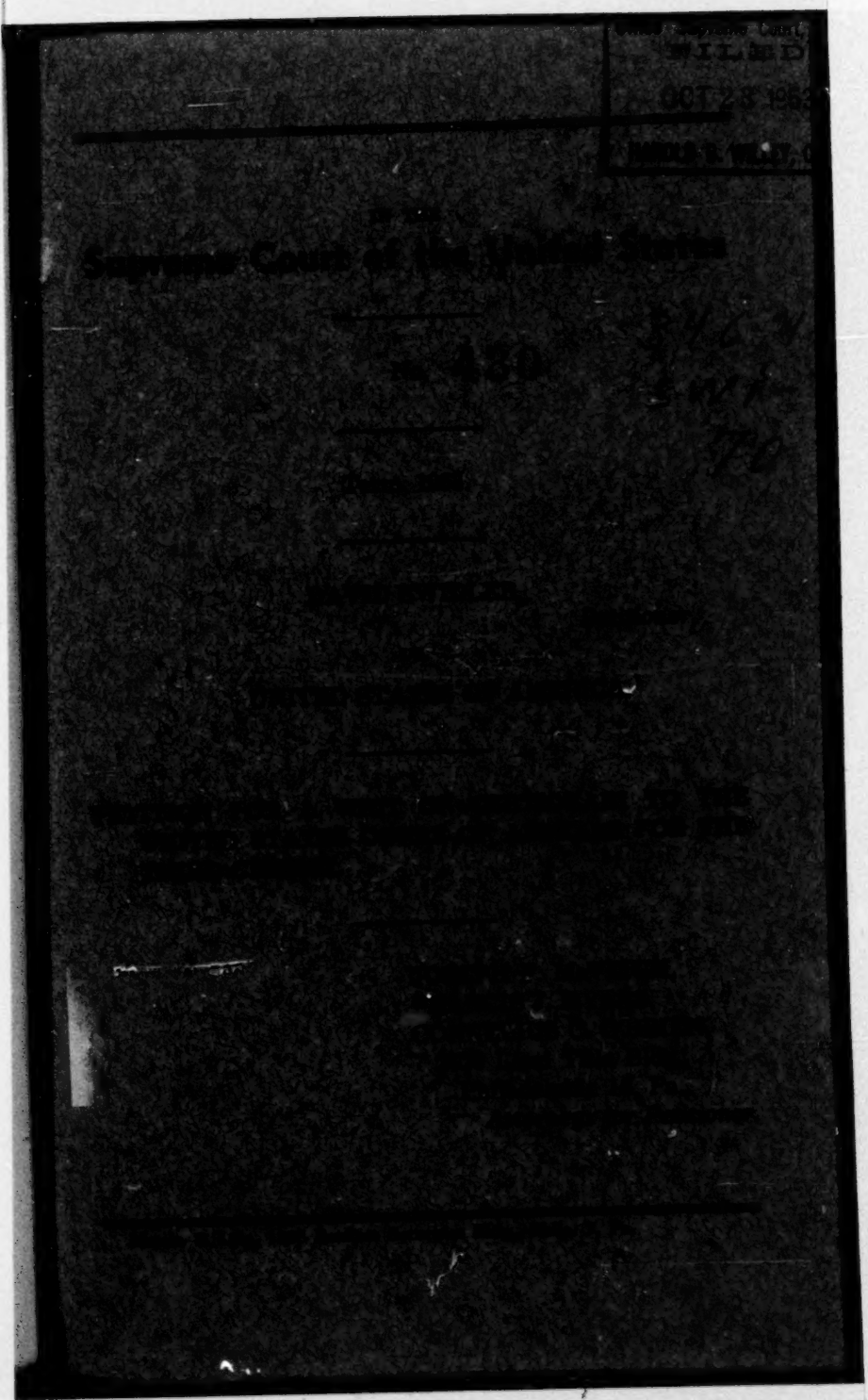
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IN THE

SUPREME COURT OF THE UNITED STATES.

No.

Term, 1953.

DAVID SWIDLER,

Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

David Swidler, by his attorneys, Cornelius C. O'Brien, Francis J. Myers and Joseph F. McVeigh, prays that a writ of certiorari issue to review the Order of the United States Court of Appeals for the Third Circuit, entered September 25, 1953.

OPINION BELOW.

The opinion of the Court of Appeals is not reported at this time but is set forth in the Record at pp. 64a-66a.

JURISDICTION.

The Order of the Court of Appeals was entered on September 25, 1953 (R. 63a). The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTIONS PRESENTED.

Whether an order entered by a Judge of a United States District Court in a criminal case, denying a defendant's motion, under Rule 29 of the Federal Rules of Criminal Procedure, 18 U. S. C., for judgment of acquittal, following a jury's verdict of guilty, is a final decision within the meaning of 28 U. S. C., Section 1291?

Whether, where a defendant in a criminal case bases his alternative motion for a new trial on the specific ground that certain evidence was erroneously admitted, a Federal Trial Judge may order a new trial "in the interests of justice," more than six months after the verdict, and without ruling on the specific reason advanced in support of such alternative motion?

STATUTES INVOLVED.

ACT OF JUNE 25, 1948, c. 646.62 Stat. 929, 28 U.S.C. 1291.

FINAL DECISIONS OF DISTRICT COURTS.

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

RULE 29, FEDERAL RULES OF CRIMINAL PROCEDURE 18 U. S. C.

MOTION FOR ACQUITTAL.

(a) MOTION FOR JUDGMENT OF ACQUTTAL. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.

(b) RESERVATION OF DECISION ON MOTION. If a motion for judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the motion is denied and the case is submitted to the jury, the motion may be renewed within 5 days after the jury is discharged and may include in the alternative a motion for a new trial. If a verdict of guilty is returned the court may on such motion set aside the verdict and order a new trial or enter judgment of acquittal.

STATEMENT.

Petitioner was charged, in an indictment containing one count, with having wilfully and knowingly attempted to defeat and evade part of his income tax liability for the calendar year 1945, by having filed a false and fraudulent return (R. 2a, 3a).

The cause was tried before a District Judge of the United States District Court for the Eastern District of Pennsylvania, at Philadelphia, and a jury from May 26 to June 3, 1952. At the close of the government's case, petitioner's motion for judgment of acquittal under Rule 29(a), FRCrim.P was denied. Petitioner offered no evidence. The jury returned a verdict of guilty on June 3, 1952. On June 5, petitioner renewed his motion for judgment of acquittal, and moved in the alternative for a new trial (R. 57a).

On December 4, 1952, the Trial Judge entered an order denying petitioner's motion for judgment of acquittal but ordered a new trial "in the interests of justice," without ruling specifically on the reason advanced in support of the

alternative motion for a new trial (R. 58a). Notice of appeal from that part of the order denying petitioner's motion for judgment of acquittal was filed on December 11, 1952. As a result of conferences between counsel for petitioner and respondent, the latter moved to dismiss the appeal on the ground that the order appealed from was not a final decision within the purview of 28 U. S. C., Section 1291 (R. 59a).

Respondent's motion to dismiss petitioner's appeal was argued on February 2, 1953. On March 9, 1953, the Court of Appeals entered an order dismissing the appeal on the ground, as stated in its opinion accompanying the order that the order appealed from was not, "at least at this stage of the proceedings," a final decision within the purview of 28 U. S. C., Section 1291 (R. 60a, 62a).

Petition for rehearing of the order dismissing petitioner's appeal was granted on April 8, 1953. The questions presented were fully briefed and argued before the Court of Appeals on June 1, 1953.

On August 17, 1953, the Court of Appeals entered an order directing that the case be set down for rehearing before the Court en banc. Reargument was had before the Court en banc on September 14, 1953.

On September 25, 1953, the Court of Appeals entered two orders, one withdrawing its prior opinion of March 9, 1953, and the other dismissing the appeal for want of jurisdiction (R. 63a).

In its opinion filed September 25, 1953, accompanying the order entered on the same day, dismissing the appeal, the Court of Appeals stated that the leading criminal case interpreting the meaning of the phrase "final decisions" is *Berman vs. United States*, 302 U. S. 211 (1937); noted that in that case it was held that "to create finality it was necessary that petitioner's conviction should be followed by sentence," and that in criminal cases a judgment is final for the purposes of appeal "when it terminates the litigation * * * on the merits" and "leaves nothing to be done but to

enforce by execution what has been determined"; and concluded that "since no judgment of sentence has been entered by the court below, a new trial having been ordered, * * * the order denying judgment of acquittal is not a final reviewable decision within the purview of Section 1291." The Court accordingly dismissed the appeal (R. 65a, 66a).

REASONS FOR GRANTING THE WRIT.

1. In holding that the denial of a defendant's motion for judgment of acquittal under Rule 29 FRCrim.P is not a final reviewable decision within the purview of 28 U. S. C., Section 1291, the Court of Appeals has decided an important, indeed a basic, question of federal law which has not been, but should be, settled by the Supreme Court.

For the purpose of deciding respondent's motion to dismiss the appeal, the Court of Appeals properly assumed that the evidence offered by respondent was insufficient to sustain the verdict of guilty, and that petitioner was entitled to a judgment of acquittal when his first motion was made at the conclusion of the evidence, and again when the motion was renewed following the jury's verdict.

Having made these assumptions, the Court of Appeals then held that the provisions of Rule 29(a) are mandatory and require the entry of judgment of acquittal if the evidence is insufficient to sustain a conviction. The Court of Appeals nevertheless concluded that the District Court's order denying petitioner's motion for judgment of acquittal was not a final reviewable decision within the purview of 28 U. S. C., Section 1291, providing that "the courts of appeal shall have jurisdiction of appeals from all final decisions of the district courts of the United States * * *" (R. 65a, 66a).

It is, of course, a fundamental principle of criminal law in this country that a defendant charged with the commission of crime may not be convicted except upon competent and relevant evidence, sufficient to establish his guilt beyond a reasonable doubt, and that where there is a total lack of such evidence, a defendant must be acquitted. This cardinal concept of the process of law has been explicitly set forth in Rule 29 of the Federal Rules of Criminal Procedure. The Rules have the force and effect of law; *Ochoa vs. United States* (C. A. 9, 1948), 167 F. 2d 341; *Rattley vs. Irelan* (C. A., D. C., 1952), 197 F. 2d 585. Hence, if there is no evidence to sustain a verdict of guilt, a defendant is entitled to a judgment of acquittal, as a matter of law, and his right to such judgment is not only embodied in the constitutional guarantee of due process, but is statutory under the clear mandate of Rule 29 FRCrim.P.

As a result of the holding of the Court of Appeals that the provisions of Rule 29(a) are mandatory, its assumption that there was no evidence to sustain the verdict, and its conclusion that the denial of judgment of acquittal is not a final decision under 28 U. S. C., Section 1291, we have the anomalous situation of a defendant, entitled as a matter of law to a judgment of acquittal, being erroneously denied the judgment to which he is entitled, and having no right to appeal from the denial of his fundamental right to an acquittal.

The complete absence of any decision or authority on the question of the finality of an order denying a motion for judgment of acquittal has resulted in a case of first impression, in which the holding of the Court of Appeals, having far reaching effect on the rights of all defendants charged with crime in the federal courts, poses serious questions vitally affecting the administration of criminal justice.

2. The fundamental importance of the questions here presented is attested by the fact that these questions have been argued at length before three judges of the Court of

Appeals on two occasions, and at the direction of the Court, on its own motion, before the Court en banc, consisting of seven circuit judges.

Rule 4(3) of the Rules of the Court of Appeals for the Third Circuit provides: "Cases and controversies shall be heard and determined by a court or division of not more than three judges unless a hearing or rehearing before the Court in banc is ordered by a majority of the active circuit judges. The Court in banc shall consist of all the active circuit judges of the circuit."

In *Western Pacific Railroad Corporation vs. Western Pacific Railroad Company*, 345 U. S. 247, 73 S. Ct. 656, 97 L. Ed. 650, this Court considered in detail the procedure for convening a United States Court of Appeals in banc. Having analyzed the effect of 28 U. S. C., Section 46(c) upon the right of a litigant to a hearing before the court in banc, this Court held that a litigant had no right to be heard by the full court, but that "the Statute is simply a grant of power to order hearings and rehearings en banc and to establish the procedure governing the exercise of that power." 345 U. S. , 97 L. Ed. (Advance p. 661). This Court stated at 345 U. S. , 97 L. Ed. (Advance p. 659): "Finally, it is essential to recognize that the question of whether a cause should be heard en banc is an issue which should be considered separate and apart from the question of whether there should be a rehearing by the division. The three judges who decide an appeal may be satisfied as to the correctness of their decision. *Yet, upon reflection, after fully hearing an appeal, they may come to believe that the case is of such significance to the full court that it deserves the attention of the full court.*" (Emphasis supplied.)

In view of this Court's opinion in *Western Pacific Railroad Corporation vs. Western Pacific Railroad Company*, supra, Judge Maris, a member of the Court of Appeals for the Third Circuit, and Chairman of the Judicial Conference Committee on Revision of the Laws, deemed it timely to describe the procedure followed in the Third Circuit for

convening the Court of Appeals in banc. In an article entitled "Hearing and Rehearing Cases in Banc", 14 F. R. D. 91, Judge Maris noted that it was impossible to state the criteria which were applied in determining to convene in banc, and stated: "It would be fair to say, however, that guiding considerations include the importance and the difficulty of the problem presented (and) divergencies in the tentative views of the judges * * *", 14 F. R. D. at p. 94. Judge Maris observed that the procedure in banc is invaluable "in the occasional case where an important new principle of law * * * or the determination of a new point of procedure of widespread interest is involved and the Court is divided in opinion or regards the matter to be of such importance as to call for the more authoritative opinion of seven judges". 14 F. R. D. at p. 97. The total number of cases heard or reheard in banc during the last annual term of the Court of Appeals for the Third Circuit was only six out of the total of 239 cases heard; 14 F. R. D. at p. 92; and while only one case was heard in banc on original argument, and one after decision by a panel of three judges (14 F. R. D. at pp. 93, 94), the situation which existed in the case at bar, namely, argument before a panel of three judges, decision, rehearing granted before a panel of three judges, and *then* rehearing before the court in banc, is apparently completely novel in the Court of Appeals for the Third Circuit.

3. The Court of Appeals while recognizing the mandatory character of Rule 29(a), observed that Rule 29(b) provides that if a motion for judgment of acquittal under Rule 29(a) be denied, the motion may be renewed within five days after the jury is discharged "and may include in the alternative a motion for a new trial", and that the Court "may on such motion set aside the verdict and order a new trial or enter judgment of acquittal." (R. 65a.) The significance of Rule 29(b), in the view of the Court of Appeals, is not specifically indicated in its opinion.

If the dismissal of an appeal from the denial of a motion

for judgment of acquittal in a criminal case is predicated, even in part, on the fact that the denial, if erroneous, can be reviewed after the defendant is convicted at a second trial, such a conclusion can be justified only by holding that Rule 29(b) vests in the trial court a discretion to either grant or withhold the defendant's basic right to an acquittal which, under Rule 29(a), the trial court is compelled to grant. If this be so, the right of a defendant to a judgment of acquittal under Rule 29(a) is totally illusory. The Court of Appeals, far from holding the right illusory, expressly recognizes the mandatory nature of the provisions of Rule 29(a). Nevertheless, in dismissing the appeal, the Court of Appeals held that the order denying judgment of acquittal is not only not a final decision, but is not even a reviewable decision within the purview of 28 U. S. C., Section 1291.

Sound logic and the proper application of basic principles of law dictate the conclusion that the provisions of Rule 29(b), while providing for alternative action by the trial court, are discretionary only insofar as the granting of a new trial is concerned. With respect to the entry of judgment of acquittal, Rule 29(b) necessarily retains the mandatory character of Rule 29(a). Rule 29(b) in providing that if the motion for judgment of acquittal of Rule 29(a) is denied, the motion may be renewed, must mean that what is renewed is the mandatory motion provided for in Rule 29(a). It is precisely because the defendant's right to a judgment of acquittal under Rule 29(a) is mandatory where there is no evidence to sustain his conviction, that the denial of such a motion is a final decision within the meaning of 28 U. S. C., Section 1291. For, in denying the motion, the trial court has, insofar as it is in its power, terminated defendant's right to an acquittal based solely on the total lack of evidence to sustain a verdict of guilty. No decision with respect to the sufficiency of evidence at a trial could be accorded greater finality.

4. In dismissing petitioner's appeal, the Court of Appeals relied on the decision of this Court in *Berman vs. United*

States, 302 U. S. 211, which the Court of Appeals described as the leading criminal case interpreting the meaning of the phrase "final decisions". The Court of Appeals adverted to the statement of Mr. Chief Justice Hughes in the *Berman* case that: "To create finality it was necessary that petitioner's conviction should be followed by sentence * * *. In criminal cases as well as civil, the judgment is final for the purposes of appeal 'when it terminates the litigation * * * and "leaves nothing to be done but to enforce by execution what has been determined" '." The Court of Appeals thereupon concluded that "since no judgment of sentence has been entered by the court below * * * the order denying judgment of acquittal is not a final reviewable decision". (R. 65a, 66a.)

At the outset, it should be noted that the *Berman* case did not involve nor interpret the meaning of the phrase "final decisions" at all, but was concerned only with the meaning of the phrase "final judgments". *Berman* involved an appeal from a sentence which had been suspended, and the only question was whether the judgment on which the sentence had been imposed lost its finality by reason of the suspension of the sentence. It was held that it had not, that the sentence was the judgment and stood as a final determination of the merits of the criminal charge. The *Berman* case, therefore, was concerned with the finality of a judgment, not the finality of a decision, which is the test of appealability under the Statute. While it was held that only a sentence constitutes a final judgment in a criminal case, it is a final decision that Congress has made reviewable. While a final judgment is always a final decision, there are instances in which a final decision is not a final judgment. *Perlman vs. United States*, 247 U. S. 7, 62 L. Ed. 950; *Go-Bart Importing Co., et al. vs. U. S.*, 282 U. S. 344, 75 L. Ed. 374; *Cohen vs. Beneficial Industrial Loan Corp.*, 337 U. S. 541, 93 L. Ed. 1528; *Stack vs. Boyle*, 342 U. S. 1, 96 L. Ed. 3.

Nor is it any longer necessary, notwithstanding the hold-

ing in the *Berman* case, that a conviction be followed by sentence to create finality. *Korematsu vs. U. S.*, 319 U. S. 432, 87 L. Ed. 1497.

The test of finality for purposes of appeal is clearly not whether the judgment or order in question terminates the litigation, but rather whether it has a final and irreparable effect on the rights of a party. *Cohen vs. Beneficial Industrial Loan Corp.*, supra. Certainly, if the order denying petitioner's motion for judgment of acquittal is not final, it can result in his conviction at a second trial, and if the order is not reviewable at all, as the Court of Appeals indicates, it will have had an irreparable effect on his fundamental rights.

In *Stack vs. Boyle*, supra, Mr. Chief Justice Vinson, speaking for the Court, said: "As there is no discretion to refuse to reduce excessive bail, the order denying the motion to reduce bail is appealable as a 'final decision' of the District Court under 28 U. S. C. (Supp. IV), Section 1291."

The true purpose of the finality requirement was stated by Mr. Justice Jackson in his separate opinion in *Stack vs. Boyle*, supra, to be "to avoid piecemeal disposition of the basic controversy in a single case 'where the result of review will be "to halt in the orderly progress of a cause and to consider incidentally a question which has happened to cross the path of the litigation" '". Applying this test to the order denying petitioner's motion for judgment of acquittal, it is evident that the purpose of the finality requirement is fully served. The basic controversy in this cause is whether petitioner is guilty or innocent of the crime with which he is charged, and more specifically, whether the evidence adduced at the trial is sufficient to sustain a conviction, for if it is not, then petitioner is entitled as a matter of law to a judgment of acquittal. A review of this basic question cannot possibly affect the orderly progress of this cause, nor will such a review be concerned with a question that incidentally happened to cross the path of the litigation. On the contrary, if the order complained of was

erroneous, the litigation is at an end. And far from halting the orderly progress of the cause, it is manifest that to require petitioner to undergo another trial, before a review of his present right to an acquittal can be had, is not only disruptive of logic and orderly procedure, but works a grave injustice upon petitioner and deprives him of due process of law. To require a new trial where the evidence, for whatever reason, is wholly insufficient to support a conviction, is an offense to fundamental fairness and due process. The scales of justice must be kept in equal balance and a defendant should not be subjected to a new trial on a charge on which he should have been acquitted merely in order to allow a prosecutor to see if he cannot do better a second time. Mr. Justice Frankfurter concurring in *Brock vs. North Carolina*, 97 L. Ed. 317, 321; Mr. Chief Justice Vinson dissenting, 97 L. Ed. 322; *Karn vs. United States* (C. A. 9, 1946), 158 F. 2d 568, 573.

5. The Court of Appeals, in dismissing petitioner's appeal, also noted that a new trial had been ordered. In its order of December 4, 1952, however, the trial court did not grant a new trial for the reason advanced by petitioner and in fact made no reference thereto. The trial court simply ordered a new trial "in the interests of justice". This order was entered more than six months after the jury's verdict of guilty which was returned on June 3, 1952. In such case the trial court was without authority to exercise on its own motion the power conferred by Rule 33 of the Federal Rules of Criminal Procedure to grant a new trial to a petitioner in a criminal case in the interests of justice, beyond the time limit fixed by the Rule for the making of a motion for a new trial, namely, five days after the verdict or finding of guilty. *United States vs. Smith*, 331 U. S. 469, 67 S. Ct. 1330, 91 L. Ed. 1610, 1614. In the *Smith* case, it is indicated that the trial court may not order a new trial on its own initiative at all, since Rule 33 provides that a court may grant a new trial to a petitioner, and does not say that the

court may order a new trial (see footnote, 91 L. Ed. 1613); and when the draftsmen of the Rules of Civil Procedure, adopted long before the Criminal Rules, wanted to give the trial judge power to grant a new trial on his own initiative, they did so in express words, Rule 59(d), Rules of Civil Procedure (see footnote, 91 L. Ed. 1615).

In any event, the trial court's discretionary power to grant a new trial under Rule 29(b) cannot detract from petitioner's absolute right to a judgment of acquittal under Rule 29 where there is no evidence to sustain a conviction, and hence cannot affect the finality of the Court's order denying petitioner's motion for judgment of acquittal.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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October, 1953.

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